Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

IDG, INC. AND R. BRENT JOHNSON,
Petitioners,

v.

CONTINENTAL CASUALTY COMPANY,
TRANSPORTATION INSURANCE COMPANY,
AND VALLEY FORGE INSURANCE COMPANY,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The United States Court of Appeals for the 10th Circuit required petitioners IDG, Inc. and R. Brent Johnson (insureds) to show a causal connection between the insureds' advertising activities and actual harm alleged to have been suffered by the underlying plaintiff Darrell Burson (Burson) as a condition precedent to entitlement to defense costs from their insurer CNA under the terms of their insurance contract. Finding this requirement unsatisfied (absence of evidence or allegation of actual harm suffered by Burson as a direct consequence of the insureds advertising activities), the 10th Circuit affirmed the District Court, denying the insureds' claims for defense costs brought against CNA. The 10th Circuit also placed on the insureds the burden to show that the insurer was aware of or should have been aware of facts to support the possibility of insurance coverage. These holdings raise two substantial questions that warrant review by this Court:

1. Whether it was error for the 10th Circuit to require the insureds to show some allegation or evidence of actual harm suffered by the underlying plaintiff directly connected to the insureds' advertising activities as a condition to coverage when the underlying plaintiff is not required to show actual harm in order to recover statutory damages for copyright infringement arising out of the insureds' advertising activities.

2. Whether the 10th Circuit imposed a duty on the insureds to investigate and disclose to their insurer which is greater than and in conflict with the insureds' cooperation duty imposed under Oklahoma law as described in *First Bank of Turley v. Fidelity and Deposit Ins. Co. Of Maryland*, 928 P.2d 298 (Okla. Sup. Ct. 1996)

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the Court below:

IDG, Inc.

R. Brent Johnson

Continental Casualty Company

Transportation Insurance Company

Valley Forge Insurance Company

STATEMENT PURSUANT TO RULE 29.6

Petitioner, IDG, Inc. states that it has no corporate parent, and that no publicly held company owns 10% or more of IDG, Inc.'s stock.

Petitioner, R. Brent Johnson is an individual.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

STATEMENT PURSUANT TO RULE 29.6 iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

TABLE OF APPENDICES ix

PETITION FOR A WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTION 1

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 6

I. Whether it was error for the 10th Circuit to require the insureds to show some allegation or evidence of actual harm suffered by the underlying plaintiff directly connected to the insureds' advertising activities as a condition to coverage when the underlying plaintiff

is not required to show actual harm in order to recover statutory damages for copyright infringement arising out of the insureds' advertising activities 7

II. Whether the 10th Circuit imposed a duty on the insureds to investigate and disclose to their insurer which is greater than and in conflict with the insureds' cooperation duty imposed under Oklahoma law as described in *First Bank of Turley v. Fidelity and Deposit Ins. Co. Of Maryland*, 928 P.2d 298 (Okla. Sup. Ct. 1996). 14

CONCLUSION 16

APPENDIX A - PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED DECEMBER 26, 2000 ..... 1a

APPENDIX B - ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA DATED AND FILED DECEMBER 26, 2000 ..... 17a

APPENDIX C - JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA DATED AND FILED DECEMBER 26, 2000 ..... 37a

APPENDIX D - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING THE

PETITION FOR REHEARING
FILED JANUARY 23, 2002 ..... 39a

TABLE OF AUTHORITIES

Page

Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc., 259 F.3d 1186, (9th Cir. 2001) 11, 13

Farmington Casualty v. Cyberlogic Tech., 996 F. Supp. 695 (E. D. Mich. 1998) 10

First Bank of Turley v. Fidelity and Deposit Ins. Co. Of Maryland, 928 P.2d 298 (Okla. 1996) 1, 6, 8, 10, 12, 14, 16

Hotaling v. Church of Jesus Christ of Latter-Day-Saints, 118 F.3d 199 (4th Cir. 1997) 7

IDG, Inc. v. Continental Casualty Co., 275 F.3d 916, (10th Cir. 2001) 1

Novell, Inc. v. Federal Ins. Co., 141 F.3d 983 (10th Cir. 1998) 9

Swierkiewicz v. Soreman, 122 S.Ct. 992 (2002) .. 10, 11, 12

VSX Corp. v. Adriatic Insurance Co., 99 F.Supp. 2d 593 (W.D. Penn. 2000) 6

STATUTES AND CONSTITUTIONAL PROVISIONS

17 U.S.C. §106 3

17 U.S.C. §106 (3) 9

17 U.S.C. §106 (5) 9, 10, 12

17 U.S.C. §504(a) 13

17 U.S.C. 504(c)(1) 3, 6, 7-10, 13

28 U.S.C. §1291 2

28 U.S.C. §1332 2

28 USCS §1254(1) 2

OTHER AUTHORITIES

Antongnini, R., "*Why Neither Side Has Won Yet: Recent Trends in Advertising Injury Coverage*", 65 Defense Counsel Journal 18 (January 1998) 6

PETITION FOR A WRIT OF CERTIORARI

Petitioners IDG, Inc. and R. Brent Johnson respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the 10th Circuit in this case. The 10th Circuit imposed a requirement on the insureds seeking to enforce the insurer's "duty to defend", to show an allegation or evidence of actual injury suffered by the underlying copyright infringement claimant that is causally connected to the insured's advertising activities. This "actual harm" requirement is plain error because an underlying copyright infringement claimant is not required to allege or prove actual harm or loss in order to recover statutory damages from the insured for copyright infringement occurring in the course of the insureds' advertising activities.

The 10th Circuit also imposed a duty on the insureds to investigate and disclose to their insurer which was greater than and in conflict with the insureds' cooperation duty imposed under Oklahoma law as described in *First Bank of Turley v. Fidelity and Deposit Ins. Co. Of Maryland*, 928 P.2d 298 (Okla. 1996).

OPINION BELOW

The opinion of the United States Court of Appeals for the 10th Circuit is reported at *IDG, Inc. v. Continental Casualty Co.*, 275 F.3d 916, (10th Cir. 2001).

JURISDICTION

1. The Judgment or Order sought to be reviewed was entered on December 26, 2001. 15a

2. The Petition For Rehearing And Petition For Rehearing En Banc was denied by Order entered January 23, 2002. 37a

3. Jurisdiction to review the Judgment or Order sought to be reversed is conferred upon the United States Supreme Court by 28 USCS §1254(1).

4. The United States District Court for the Northern District of Oklahoma had subject matter jurisdiction by virtue of 28 U.S.C. §1332 (Diversity). There was complete diversity between the parties. IDG, Inc. was an Oklahoma Corporation with its principal place of business in Oklahoma. Johnson was a citizen of the State of Oklahoma. Defendants (collectively CNA) were corporations incorporated in Illinois or Pennsylvania, with their principal place of business in Illinois). The amount in controversy exceeded $75,000.

5. The United States Court of Appeals for the 10th Circuit had jurisdiction over the appeal by virtue of 28 U.S.C. §1291. The appeal related to a final judgment of the United States District Court for the Northern District of Oklahoma. The District Court entered judgment dismissing all claims as to all parties on December 26, 2000. Johnson filed a Notice of Appeal on January 5, 2001, within the time permitted by FRAP 4(a)(1).

STATUTES INVOLVED

17 U.S.C. §504(c)(1) provides:

> (c) Statutory Damages.--
> (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

17 U.S.C. § 106 provides:

> Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
>
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

STATEMENT OF THE CASE

The Petitioners (collectively "Johnson" or "insureds") maintained insurance policies with the Respondent insurance companies (collectively "CNA" or "insurer") for *inter alia*, defense coverage for claims related to copyright infringement occurring in the course of the insureds' advertising activities. 20a-22a Johnson alleged that CNA breached its insurance contract by refusing to pay the cost to defend Johnson incurred in the copyright infringement lawsuit brought by Darrell Burson[1] ("Burson" or "underlying plaintiff"). 17a-18a

The District Court found that software programs Burson claimed ownership to were regularly copied and

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[1]Darrell Burson was the "*underlying plaintiff*" referenced in the published opinion of the 10th Circuit.

distributed (Burson alleged this was done without his authorization) to prospective customers of Johnson as Johnson's method of advertising. 26a

CNA's insurance policies define advertising injury to include claims asserted against the insured for copyright infringement committed in the course of advertising. 20a-21a The CNA policies state that CNA "will pay those sums the insured becomes legally obligated to pay as damages . . . to which this insurance applies". 20a The policy also states: "We[2] will have the right *and duty* to defend any 'suit' seeking those damages." 20a (Emphasis added)

Burson claimed Johnson committed copyright infringement by copying and distributing software without authorization. Burson did not limit his claim to infringement for copying and distributing in the context of a sale, but sought to enjoin Johnson from in any way copying and distributing copies of the program. 15a, *n.* 7

One of the ways Johnson copied and distributed software was to distribute evaluation copies of the software to potential customers to advertise Johnson's software products. 26a-27a

On cross-motions for summary judgment the District Court found "no potential for coverage under the CNA Commercial General Liability and umbrella policies . . . or reasonable expectation thereunder, that requires CNA" to defend or indemnify IDG and Johnson in the Burson cases and granted CNA's Motion For Summary Judgment dismissing the Johnson suit. 35a

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[2]Referring to the insurer CNA.

The United States Court of Appeals for the 10th Circuit affirmed the District Court's judgment, holding there was insufficient evidence to establish a causal connection between the alleged advertising activity of distributing copies of the infringing product and *actual* damages to the underlying plaintiff [Burson]. 12a-13a. The 10th Circuit also held Johnson did not provide the insurer sufficient data for CNA to ascertain that Burson's claims related to Johnson's advertising activities. This issue was raised by the Circuit Court itself, for the first time on appeal and not by CNA. 13a-14a

REASONS FOR GRANTING THE PETITION

"Advertising injury" insurance coverage is frequently litigated in federal and state courts. The scope of "advertising injury" coverage remains unsettled. See "*Why Neither Side Has Won Yet: Recent Trends in Advertising Injury Coverage*", R. Antongnini, 65 Defense Counsel Journal 18 (January 1998). See also, *VSX Corp. v. Adriatic Insurance Co.*, 99 F.Supp. 2d 593, 621-622 (W.D. Penn. 2000). The 10th Circuit's published opinion has added to this uncertainty and created a "catch-22" requiring the insured to prove the existence of actual harm allegedly suffered by the underlying plaintiff when the underlying copyright infringement plaintiff need not allege nor prove actual harm, in order to recover statutory damages for each act of infringement.

Under copyright law, the underlying plaintiff seeking copyright infringement damages may elect at any time before judgment is entered to receive statutory damages (instead of actual damages and without proof of actual damages) for each act of infringement. 17 U.S.C. 504(c)(1).

The 10th Circuit misunderstood Oklahoma law in its reading of *First Bank of Turley v. Fidelity and Deposit Ins. Co.*

Of Maryland, 928 P.2d 298 (Okla. 1996). The 10th Circuit's Opinion creates a conflict between Courts of the 10th Circuit and the Oklahoma Supreme Court.

I. Whether it Was Error for the 10th Circuit to Require the Insureds to Show Some Allegation or Evidence of Actual Harm Suffered by the Underlying Plaintiff Directly Connected to the Insureds' Advertising Activities as a Condition to Coverage When the Underlying Plaintiff Is Not Required to Show Actual Harm in Order to Recover Statutory Damages for Copyright Infringement Arising out of the Insureds' Advertising Activities

The 10th Circuit erred in requiring Johnson to show a "causal connection" (nexus) between *actual* harm alleged (or potentially suffered) by Burson and Johnson's advertising activities as a condition to coverage for defense costs. Burson had no duty to prove actual harm to be entitled to statutory damages for any claim of copyright infringement arising from Johnson's advertising activities. A copyright owner may, at any time prior to entry of judgment in an underlying copyright infringement case, elect to recover a statutory minimum damage amount instead of actual damages for <u>each</u> act of infringement. 17 U.S.C. §504(c)(1) See also, *Hotaling v. Church of Jesus Christ of Latter-Day-Saints*, 118 F.3d 199 (4th Cir. 1997). "Each act of infringement is a distinct harm giving rise to an <u>independent claim</u> for relief". *Hotaling*, at 204. (Emphasis added) Burson had no statutory requirement to allege or prove a "causal connection" between Johnson's advertising activities (or any other act of copyright infringement) and "actual harm". 17 U.S.C. §504(c)(1) only requires Burson show at least <u>one</u> act of unauthorized distribution of his copyrighted work to recover statutory damages. If Burson could prove any unauthorized act of

distribution of his copyrighted program in the context of Johnson's advertising activities each act represents an independent claim for statutory damages. The District Court found (1) Burson sued for copyright infringement and (2) Johnson was distributing the alleged infringing software in the context of advertising. 26a-27a This potential for liability triggers the duty to defend under *First Bank of Turley*, supra.

Johnson's alleged acts of infringement occurring outside the context of "advertising" are not relevant to acts of infringement occurring within the context of "advertising" since each discrete act of infringement is considered an independent claim. If the copyright owner elects statutory damages before judgment is entered, each discrete act of copyright infringement is added by numerical count, multiplied times (at the very least) the minimum amount (required to be assessed) by statute and the sum equals the monetary judgment to be entered. Because 17 U.S.C. §504(c)(1) allows the copyright owner to delay this election to demand statutory damages until immediately before judgment is entered (and after trial of the case has concluded) the alleged infringer (Johnson here) remains potentially liable for a statutory damage award (without any need for any allegation or proof of actual damage or harm) throughout the case.

It was error for the 10th Circuit to require Johnson prove an "extra" element of a potential for actual harm (connected to Johnson's advertising activities) in order to gain insurance coverage because no similar element is imposed on the underlying plaintiff. It was enough for Johnson to show that Johnson was potentially liable to Burson for statutory damages arising from Johnson's advertising activities in order to be entitled to a defense to be paid for by CNA under the insurance policy.

The 10th Circuit found that the mere fact Johnson advertised a product for which Burson claimed copyright infringement "did not *cause* [the underlying plaintiff's] injuries". 14a. Causation in the context of copyright infringement (relative to statutory damages) is not whether the advertising activity caused actual harm but whether the event of infringement occurring in the context of advertising would *cause* statutory damages to be awarded. The *causal* link here is not between "an act" and "potential resulting harm" but rather is between "an act" and "resulting potential entitlement to statutory damages". Johnson's distribution of evaluation copies of the disputed software in the context of advertising products is sufficient standing alone to support a claim by Burson for statutory damages pursuant to 17 U.S.C. §504(c)(1) for each discrete "event or act" of distribution. Burson may recover statutory damages separately for each act of infringement regardless of whether one act was copying, another arose from a sale or lastly for an act of distribution of promotional examples of the work in the course of Johnson's advertising. Contrary to the 10th Circuit's decision, the second prong of the *Novell*[3] test must be deemed satisfied [or entirely dispensed with in a copyright infringement related case] if the underlying plaintiff has alleged copyright infringement, and acts of infringement (unauthorized distribution, displaying or lending of a copyrighted work) have been demonstrated to have occurred in "the course of the insureds' advertising" activity for which the underlying plaintiff may potentially recover statutory damages. See 17 U.S.C. §106 (3), (5) and §504(c)(1). It was factually undisputed that Johnson was distributing evaluation copies of the alleged copyrighted computer software to prospective customers as Johnson's method of advertising. The 10th Circuit's reliance on Burson's federal complaint to support

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[3]*Novell, Inc. v. Federal Ins. Co.*, 141 F.3d 983 (10th Cir. 1998)

its conclusion that Burson was only suing for infringement related to sales and not Johnson's advertising activities is misplaced for two reasons. (1) Burson's complaint as drafted did not preclude him from recovering statutory damages for acts of infringement occurring in the course of Johnson's advertising nor from presenting evidence on that issue at trial. A federal complaint and the pleading requirements of FRCP 8 do not constrain a plaintiff so narrowly. *Swierkiewicz v. Soreman*, 122 S.Ct. 992 (2002). (2) Oklahoma law does not limit the analysis for the potential of liability to the pleadings, but must be determined from the underlying facts available from the insured and other sources. *First Bank of Turley* at 303.

The 10th Circuit's reliance on *Farmington Casualty v. Cyberlogic Tech.*, 996 F. Supp. 695 (E. D. Mich. 1998) is misplaced. *Farmington* adopted the position: "when the claim for infringement exists irrespective of the advertising activities, the claim for defense must fail". *Farmington* at *n.* 17. *Farmington* inferred that a copyright infringement claim for activities outside the context of advertising may negate claims for infringement arising directly from advertising activities. The *Farmington* Court overlooked the fact that each act of infringement is an independent claim and each is separately compensable. The District Court in *Farmington*, although having a copyright case under consideration, applied trademark law to support its analysis. This is particularly evident where the *Farmington* Court rejects the idea that a claim could be supported by merely "displaying" a product. *Farmington* at 704. However, merely "displaying" a copyrighted work without authorization is an act of copyright infringement entitling the owner to recover statutory damages. 17 U.S.C. §§106(5) and 504(c)(1). Whether separate acts of infringement occurred independent of or preceding infringement "in the course of advertising" (such as sales) is of no consequence in

the context of copyright law since each separate "alleged act of infringement" is an independent claim and may support a separate award for statutory damages for each such claim. The traditional notion of causation (wrongful conduct resulting in entitlement to damages, lost profits or disgorgement of profits from the wrongdoer) does not fully apply in every instance in copyright cases where the claimant may elect to recover (at his option before final judgment is entered) a minimum statutory damage award for each instance of infringement. *Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259 F.3d 1186, 1194 (9th Cir. 2001).

The 10th Circuit placed emphasis on Burson's allegation of copying, and substantial monetary damages. 12a It was error to deny Johnson coverage simply because Burson alleged and may have also potentially recovered monetary damages against Johnson for copyright infringement occurring outside the context of Johnson's advertising activities (i.e. copying). The 10th Circuit appears to confine Johnson to the precise statements in Burson's complaint however Burson is <u>not</u> similary confined by that complaint. The 10th Circuit's view of the pleadings as narrowly confining the claim is contrary to *Swierkiewicz*, supra. Burson's entitlement to recover for each discrete act of infringement outside the context of advertising activities (non-covered occurrence) does not preclude entitlement to also recover statutory damages for each discrete act of copyright infringement occurring within the context of Johnson's advertising activities. They must each be considered separately. The "gravaman" of Burson's claims is a multitude of independent claims for infringement one having no greater significance than another (in the context of evaluating the duty to defend).

The 10th Circuit misperceived copyright law in its search for anything in the pleadings or other relevant source wherein there was any connection linking Johnson's advertising practice with *actual* injuries suffered by Burson. 13a As referenced above, Burson need not allege nor prove actual damage. Burson may assert a claim for "statutory damages" long after the pleading and pretrial stages have passed. A search of the *pleadings* is but one of several places the insurer must look to see if a potential for liability exists triggering the insurer's duty to defend. *First Bank of Turley v. Fidelity and Deposit Ins. Co. of Maryland*, 928 P.2d 298 (Okla. 1996) Here, the potential is self apparent in the 10th Circuit's own opinion. 11a, *n.* 5.

First Bank of Turley v. Fidelity and Deposit Ins. Co. of Maryland, 928 P.2d 298 (Okla. 1996) requires the insurer to defend if a potential for coverage exists and without regard to the outcome of the underlying suit. *First Bank of Turley* at 303-304. The potential continually existed throughout the life of Burson's infringement suit(s) that Burson could have succeeded in proving copyright ownership and unauthorized distribution in the course of Johnson's advertising and recover statutory damages without proof of any actual loss.

Pursuant to Fed. R. Civ. P. 8(a) and 17 U.S.C. §106(5) Burson need only allege that (1) he is the owner of the copyrighted work and (2) his copyrighted work was "distributed" without authorization to support a claim for copyright infringement, and be potentially entitled to statutory damages. Burson is not required to plead facts establishing a prima facie case. *Swierkiewicz* at 997. Allegations of monetary damage and lost profits for which the 10th Circuit emphasized may be abandoned at the end of the case and immediately prior to judgment being rendered. Here, little reliance should be placed on something so easily discarded.

The absence of any evidence linking "advertising activities" with calculable actual economic loss or actual injury is not surprising in a copyright case where statutory damages are frequently sought rather than the copyright owner undertaking the costly burden of proving damages with accountants and expert witnesses as to each discrete event of unauthorized displaying, distributing, or lending etc. See *Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259 F.3d 1186, 1194 (9th Cir. 2001)[4] "Causation" or "nexus" between activities of advertising and some directly resulting calculable actual harm suffered must not be an element or "test" of whether there is advertising injury coverage (in the context of an underlying copyright infringement claim).

A better test in the context of an underlying copyright infringement claim would be whether there is evidence to suggest that Johnson engaged in some act (or may have engaged in some act), "in the course of advertising"[5], that may potentially entitle the underlying plaintiff to recover statutory damages for copyright infringement. This "better test" is satisfied here.

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[4]"... the Copyright Act provides a plaintiff the option of electing either statutory damages or actual damages. 17 U.S.C. §504(a) (2001). In this case, Columbia elected to seek statutory damages. A plaintiff may elect statutory damages "*regardless of the adequacy of the evidence offered as to his actual damages and the amount of the defendant's profits*." *Columbia Pictures* at 1194. Emphasis added.

[5]Terminology of the insurance policy.

II. The 10th Circuit Imposed a Duty on the Insureds to Investigate and Disclose to Their Insurer Which Is Greater than and in Conflict with the Insureds' Cooperation Duty Imposed under Oklahoma Law as Described in *First Bank of Turley V. Fidelity and Deposit Ins. Co. Of Maryland*, 928 P.2d 298 (Okla. Sup. Ct. 1996)

The 10th Circuit misunderstood the "duty" to investigate and report described in *First Bank of Turley v. Fidelity and Deposit Ins. Co. of Maryland*, 928 P.2d 298 (Okla. 1996). In *First Bank of Turley*, the Court said:

> "It is the insured's sole duty to give its insurer timely and adequate notice of a third-party claim [fn19] to aid the insurer in the discovery of facts bearing on coverage. Once an insurer receives notice of a claim and proof of loss, the insurer should evaluate the matter and make a reasonable investigation to determine whether a potential for coverage exists. [fn20] An insured in turn has an obligation to cooperate with the insurer, which is both contractual [fn21] and implied in law." [fn22]

First Bank of Turley, at 304 (emphasis added)

An insurer is in a better position to evaluate the complexities of insurance coverage and know what factual issues should be sought out (from the claims, the insured and other sources) that may bear on coverage. The decision by the District Court shows repeated communication by Johnson to the insurance carrier. 23a-24a Johnson was never faulted by CNA for neglecting the insured's duty to cooperate or respond to any question or request for information during the insurer's

investigation. The issue of whether Johnson made adequate disclosure to the insurer was raised for the first time by the 10th Circuit Panel itself. The issue of adequate disclosure had not previously been raised or complained of by CNA. CNA never claimed Johnson failed to provide any information CNA requested, or failed to fully cooperate. The burden to investigate and learn essential facts to make a well reasoned decision on coverage - ***is on the insurer***, not the insured. The 10th Circuit has now created a new defense for insurance companies, namely that the carrier may now argue that it correctly chose not to defend because the insured failed to volunteer a critical piece of information affecting coverage even though the insurer never inquired about that information prior to being sued by its insured. The relationship between insurer and insured is many times adversarial, where the carrier is motivated (in order to save money) to shun knowledge and reject claims for coverage. The insured must not be compelled to retain counsel, investigate the facts, interpret policy language and "make the case" for coverage before it is entitled to coverage for defense of a claim. That duty rests with the insurer. The Circuit Court's decision gives a boost to the insurer's desire to avoid learning information that would support coverage and lead to the expenditure of defense costs by the insurer.

CNA readily concedes that it only asked what it now perceives as the critical questions about the advertising activities of Johnson and whether they could be linked to copyright infringement and advertising injuries, "after" suit was filed against CNA. The failure of CNA to ask critical questions is not a defense to coverage, but rather proof the insurer conducted an inadequate investigation after a defense was demanded by Johnson.

Whether the insurer neglected its duty to adequately

investigate and learn during the course of the Burson suit what it later learned in the course of the suit brought against the insurer (by Johnson) was not an issue for which evidence was presented or litigated before the District Court and was not an issue on which the District Court made its determination of non-liability favoring the insurer. Moreover, CNA never asserted nor raised as an issue in defense before the District Court that (1) information about the advertising activities of Johnson had been withheld, or (2) that it had denied the defense because of a lack of cooperation from Johnson or (3) that the information about these advertising activities was "unavailable" from the insured or other sources at the time the defense was rejected. It was error for the 10th Circuit to fault Johnson for not volunteering earlier, rather than faulting CNA for not asking earlier. It was error for the 10th Circuit to create and decide a defense in favor of CNA when Johnson had no opportunity to present evidence to a fact finder at trial in opposition to this "new" defense.

A reasonable investigation by CNA (which is mandated by *First Bank of Turley*) would have readily revealed Johnson's advertising activities if the same questions asked by the insurer (as quoted in the District Court's decision at 30a-31a) during suit against CNA had been asked at the time the defense was demanded

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted.

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

IDG, INC. and R. BRENT JOHNSON,
Plaintiffs-Appellants,

v.

CONTINENTAL CASUALTY COMPANY, TRANSPORTATION INSURANCE COMPANY, and VALLEY FORGE INSURANCE COMPANY,
Defendants-Appellees.

No. 01-5011

Filed December 26, 2001

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 99-CV-111-B)

Steven M. Harris (Michael D. Davis with him on the brief) of Doyle Harris Davis & Haughey, Tulsa, Oklahoma for Plaintiffs-Appellants.

Linda J. Burgess of Hughes & Luce, L.L.P., Austin, Texas (Frances E. Patton of Pierce, Couch, Henrickson, Baysinger & Green, L.L.P., Oklahoma City, Oklahoma with her on the brief) for Defendants-Appellees.

Before **TACHA**, Chief Judge, **EBEL** and **GARTH**,[1] Circuit Judges

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GARTH, Circuit Judge

In the 1990s, plaintiffs-appellants IDG, Inc. and R. Brent Johnson, the majority stockholder and executive officer of IDG (together, "IDG"), purchased commercial insurance policies from defendants-appellees Continental Casual Company, Transportation Insurance Company and Valley Forge Insurance Company (collectively, "CNA"). Among other things, these policies provided liability and defense coverage in the event IDG was sued for "advertising injuries" by third-parties. In January 1999, IDG filed suit against CNA, claiming CNA was obligated to provide a legal defense under those policies for two lawsuits commenced against IDG by a former employee named Darrell Burson (the "Burson Lawsuits"). The district court granted summary judgment in favor of CNA, and IDG appealed. For the reasons discussed below, we will affirm.

I.

During the relevant time period, IDG was insured under the following insurance policies: (1) Valley Forge Insurance Company's commercial general liability ("CGL") policies, Policy Nos. P1 27819677 (effective September 1993 to September 1994) and B1 31455338 (effective September 1994

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[1] Honorable Leonard I. Garth, United States Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

to September 1996); (2) Transportation Insurance Company's CGL policies, Policy No. B1 57115402 (effective September 1996 to September 1999); and (3) Continental Casualty Company's commercial umbrella policies, Policy No. B1 56852312 (effective September 1996 to September 1999).

The relevant portions of the CGL policies issued to IDG state the following:

> **COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY**
>
> 1. Insuring Agreement.
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" or *"advertising injury"* to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages . . .
>
> b. This insurance applies to: . . .
>
> (2) *"Advertising injury" caused by an offense committed in the course of advertising your goods, products or services*; but only if the offense was committed in the "coverage territory" during the policy period. . . .
>
> * * *
>
> 1. "Advertising injury" means injury arising out of one or more of the following

offenses:

> a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
> b. Oral or written publication of material that violates a person's right to privacy;
> c. Misappropriation of advertising ideas or style of doing business; or
> d. *Infringement of copyright*, title or slogan.

The commercial umbrella policies issued to IDG provide that CNA will pay "all sums that the insured becomes legally obligated to pay as 'ultimate net loss' because of . . . 'advertising injury,' caused by an 'incident' which takes place during the policy period and in the policy territory." The definition of "advertising injury" under the umbrella policies is identical to that of the CGL policies.

II.

On March 11, 1994, Darrell Burson, a former employee of IDG, filed suit against IDG and Johnson in state court (the "State Lawsuit"). Among other claims, Burson sought royalty and ownership rights to a series of computer programs known as SuperVision. Essentially, Burson alleged that he owned part or all of SuperVision, and that Johnson and he "entered into an agreement [regarding] the division of gross process from the sale of . . . SuperVision" and that "Johnson breached [that] agreement by concealing information regarding sales of SuperVision and by withholding and causing IDG to withhold [Burson's] share of the proceeds from the sales." Burson's

First Amended State Complaint at ¶¶ 5-6. In addition, Burson sought unpaid wages and unpaid royalties, alleging conversion of SuperVision, breach of fiduciary duty, fraud, and breach of a stockholder agreement.

IDG notified CNA of the State Lawsuit on March 28, 1994, two weeks after the suit was filed, seeking defense coverage under its insurance policies. On May 10, 1994, CNA declined to provide any defense or indemnity coverage of the suit on the ground that Burson's state action did not allege "advertising injuries" as covered by the policies. No additional information was sent to CNA until three years later in May 1997, when IDG requested that CNA re-evaluate coverage. On August 21, 1997, CNA denied IDG's request upon re-evaluation.

The state court eventually dismissed the ownership causes of action on the basis of federal preemption over copyright claims, and abated all the state law claims until the copyright related issues were resolved. The State Lawsuit was ultimately settled for approximately $50,000, but the copyright claims were decided in a federal lawsuit.

In September 1997, Burson filed suit in the United States District Court for the Northern District of Oklahoma alleging copyright infringement against IDG and others (the "Federal Lawsuit"). Burson contended that he was the author and owner of the copyrighted SuperVision program, and that IDG infringed his copyright by "cop[ying] some or all of the computer programs authored and copyrighted by Burson and . . . prepar[ing] unauthorized derivative software from Burson's computer programs." Federal Lawsuit Complaint at ¶ 3. IDG ultimately prevailed on the merits of this suit when the court – pursuant to a bench trial – agreed with IDG's "works made for hire" defense and found Burson to have no ownership interest

in the copyrighted works.

On September 3, 1998, one year after the Federal Lawsuit was filed and six weeks after it was tried before a federal judge, IDG notified CNA of the Federal Lawsuit, seeking coverage under its insurance policies. This was the first time CNA was informed of the existence of the Federal Lawsuit. CNA denied coverage for the Federal Lawsuit on September 22, 1998 and again on November 18, 1998 (upon reconsideration). In its November 18, 1998 letter, CNA informed IDG that it did not believe that the Federal Lawsuit involved claims that fell within the ambit of an "advertising injury" as contemplated under the insurance policies.

IDG filed suit against CNA on January 15, 1999 in Oklahoma state court, alleging breach of insurance contract and bad faith for failing to provide a defense to both Burson lawsuits. According to IDG, it incurred legal expenses totaling over $270,000 in defending the lawsuits, as well as $50,000 in settling the State Lawsuit. In February 1999, CNA removed the action to the U.S. District Court in the Northern District of Oklahoma.

The parties cross-moved for summary judgment in July 1999. By Order on December 26, 2000, the District Court found in favor of CNA. In so ruling, the district court found that there was no "advertising injury" as contemplated under the insurance policies. In particular, the court held that the method of promotion utilized by IDG – providing trial copies of SuperVision to potential customers for their evaluation – was not an advertising activity because the product could not be an advertisement for itself. The district court also ruled that even if SuperVision could serve as an advertisement for itself, IDG failed to demonstrate the requisite causal nexus between Burson's alleged injuries and advertising activity.

III.

We review the district court's grant of summary judgment de novo, applying the same standard used by the court below. V-1 Oil Co. v. Means, 94 F.3d 1420, 1422 (10th Cir. 1996). "Summary judgment is appropriate only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Novell, Inc. v. Federal Ins. Co., 141 F.3d 983, 985 (10th Cir. 1998) (quoting Fed. R. Civ. P. 56(c)). "We examine the factual record and reasonable inferences therefrom in the light most favorable to the nonmoving party." Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). If there is no genuine issue of material fact in dispute, we must determine whether the district court correctly applied the law." Novell, 141 F.3d at 985.

IV.

In this diversity action, state law must be utilized in defining the terms of the insurance policies and in articulating the scope of CNA's duty to defend under those policies. See Novell, 141 F.3d at 985 (citing Barrett v. Tallon, 30 F.3d 1296, 1300 (10th Cir. 1994)). The parties do not dispute the application of Oklahoma law to this matter and, accordingly, Oklahoma law is controlling. See Mauldin v. Worldcom, Inc., 263 F.3d 1205, 1212 (10th Cir. 2001) (holding that parties may waive choice of law arguments by failing to adequately brief them); see also Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1547 (10th Cir.1995).

The Supreme Court of Oklahoma has stated that while

an insurer's duty to defend its insured is broader than its duty to indemnify, this duty "is not unlimited." First Bank of Turley v. Fidelity and Deposit Ins. Co. of Maryland, 928 P.2d 298, 303 (Ok. 1996) (footnote omitted). Rather, "the defense duty is measured by the nature and kinds of risks covered by the policy as well as by the reasonable expectations of the insured." Id. (footnote omitted) Accordingly, "an insurer has a duty to defend an insured whenever it ascertains the presence of facts that give rise to the *potential of liability* under the policy." Id. (emphasis in original) (footnote omitted). To have the "potential of liability," the "'complaint [must] state a cause of action that gives rise to the possibility of a recovery under the policy; there need not be a probability of recovery.'" Id. at 303 n. 14 (quoting 7C Appleman, Insurance Law & Practice § 4683.01 at 67 (Berdal ed. 1979)). This determination is made "on the basis of information gleaned from the petition (and other pleadings), from the insured and from other sources available to the insurer at the time the defense is demanded (or tendered) rather than by the outcome of the third-party action." Id. at 303-04.

Keeping these standards in mind, the question in this appeal becomes whether the Burson Lawsuits gave rise to the "possibility of" coverage under the insurance policies at the times IDG requested a defense from CNA. Because the only basis for coverage under the policies is for "advertising injury," the answer to this question necessarily entails an analysis of the meaning of that contractual term under Oklahoma law.[2]

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[2] Under Oklahoma law, an "insurance policy constitutes a contract," subject to general interpretation principles of ordinary contract law. See First Bank of Turley, 928 P.2d at 303 n. 6 (citing Silver v. Slusher, 770 P.2d 878, 883 (Ok. 1988); Christian v. Metropolitan Life Ins. Co., Okl., 366 P.2d 445, 488 (Ok. 1977); 12 Appleman, Insurance Law & Practice § (continued...)

In Novell, Inc. v. Federal Ins. Co., we analyzed very similar language of an insurance policy involving the interpretation of "advertising injury." In our analysis, we utilized a two-part structure: (1) "we first examine whether [the underlying plaintiff's] complaint alleged a predicate offense, i.e., one of the offenses specifically listed in the definition of 'advertising injury.' [(2)] We then examine whether there was any causal connection between [the underlying plaintiff's] alleged injuries and [the instant] plaintiff's advertising activities." Novell, 141 F.3d at 986. While we substantively applied Utah law in answering these questions, there is no reason why we should not utilize the same two-part structure in answering this question under Oklahoma law.

A. Predicate Offense

Under the first prong of the Novell test (predicate

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[2](...continued)
7004 at 34-56 (1981 & Supp. 1995)). Insurance contracts are to be interpreted "according to the plain meaning of the language in the policy," VBF, Inc. v. Chubb Group of Insurance Co., 263 F.3d 1226, 1230 (10th Cir. 2001), and "must be accepted in their plain, ordinary and popular sense." Torres v. Sentry Ins., 558 P.2d 400, 401 (Ok. 1976) (internal quotations omitted); see also Max True Plastering Co. v. United States Fidelity and Guaranty Co., 912 P.2d 861, 865 (Ok. 1996) ("[the terms of an insurance contract] are given effect according to their ordinary or popular meaning."). If a policy term is ambiguous – i.e., where it is susceptible to two or more different meanings – "it will be construed against the insurer." VBF, 263 F.3d at 1230-31 (internal quotations omitted). "In addition, Oklahoma recognize[s] the 'reasonable expectations doctrine' when the policy is ambiguous or contains unexpected exclusions arising from technical or obscure language or which are hidden in policy provisions." Id. at 1231 (internal quotations omitted). Under this doctrine, "coverage exists, if the insurer or agent has created a reasonable expectation in the insured that coverage exists." Id.

offense), we must determine whether the Burson Lawsuits alleged one of the four offenses specifically listed in the definition of "advertising injury" in § 1(d) of the insurance policies.[3] CNA concedes the existence of a predicate offense, and does not dispute that the Burson's Lawsuits alleged copyright infringement as enumerated therein.

B. Causal Connection

At issue here, therefore, is whether the second prong of the Novell test has been fulfilled — whether there was a "causal connection" between the injuries alleged by Burson (the copyright infringement) and IDG's advertising activities.

IDG contends that Burson's alleged injuries arose out of the course of IDG's advertisement of SuperVision. At the heart of this contention is IDG's reliance upon its promotional practice whereby it would distribute copies of SuperVision to potential customers for their evaluation with the hopes that they might buy it. IDG argues that this activity was indeed advertising activity and that Burson's alleged injuries were caused by it. As its evidentiary support of this assertion, IDG refers only to the following testimony adduced in the instant

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[3] As previously mentioned, ¶ 1(d) of the CGL policies issued to IDG states that "'[a]dvertising injury' means injury arising out of one or more of the following offenses:

> a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
> b. Oral or written publication of material that violates a person's right to privacy;
> c. Misappropriation of advertising ideas or style of doing business; or
> d. *Infringement of copyright*, title or slogan."

litigation: (1) Johnson's response to an interrogatory by CNA;[4] (2) Johnson's deposition testimony dated June 17, 1999, wherein he explained the purported "advertising" nature of certain activities by IDG concerning SuperVision; [5] and (3)

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[4] Johnson' response to Interrogatory No. 9 states:

> Mr. Burson's pleadings make claims related to copyright infringement for goods sold by Johnson/IDG which in turn were advertised for sale. From Mr. Burson's testimony such alleged conduct occurred as early as June 1993, some in September and October 1993, and at various times thereafter. The claims of Burson and the underlying facts present a potential for coverage when considered broadly under the policy. Because there is an allegation of placing the product on the market for sale, there was a potential that the infringement related to or was connected to advertising.

[5] Johnson testified at his deposition as follows:

Q: . . . Tell me why – further why you contend that the State or Federal Lawsuit involved an assertion by Burson that he – the acts of which he complained, his injuries were caused by Johnson/IDG advertising its goods, products or services.

A: I mean, that's the whole thing of what we were doing. I mean, we were – we were making copies of programs which he claimed that were his. . . . That he had – that he at a later date filed copyright on, that we were – we were copying those and delivering those to customers so that they could evaluate them and to see whether or not they wanted to use them. We were – this is the manner in which – the manner in which we advertise our product is by providing people with free trials. We copy the programs. We send them out on some sort of electronic media and they install them, evaluate them, see how they work, observe them, and make a decision. . . . That is our method of operation, a method of advertising.

Q: So before you provide it to a customer for a demo, you've already

(continued...)

Johnson's affidavit testimony provided on July 27, 1999, approximately one month after his deposition.[6]

Notwithstanding Johnson's self-serving characterizations of Burson's claims, a careful examination of Burson's underlying lawsuits belies IDG's contention. Even assuming that a product can advertise itself and that the activity described by IDG is, in fact, "advertising" activity as broadly construed under the insurance policies, the record clearly reveals that Burson sued IDG for *copyright infringement* arising out of IDG's copying and sale of SuperVision, and *not out of its promotional activity*.

First, the gravamen of Burson's complaints is that IDG converted his portion of the copyright in SuperVision by "cop[ying] some or all of the computer programs authored and copyrighted by Burson and [by preparing] unauthorized derivative software from Burson's computer programs." See Federal Lawsuit Complaint ¶ 3. As a consequence, Burson

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[5](...continued)
copied what Mr. Burson claims was his proprietary interest?

A: Yes

[6] In ¶ 12 of his affidavit, Johnson stated:

Independent of the policy provisions that establish coverage, IDG and I have and had a "reasonable expectation" of coverage for defense and indemnity for the claims made in the "Burson Cases." This reasonable expectation comes in part from policy provisions that state that the insurer will defend claims made against IDG and me if they involve copyright infringement that occurs in the course of advertising. IDG and I copied Burson created source and object code in the course of and as part of IDG's advertising program for its products. Burson claims that IDG and I had infringed his copyright by copying the programs.

contended that he "has suffered, and will continue to suffer, substantial money damages and impairment of his ownership rights in the computer programs. . . . [as a result of IDG] deriving illegal profits at Burson's expense." Id. at ¶ 4.

In the State Lawsuit, Burson sought "royalties due [to him] on the SuperVision project," First Amended State Complaint at ¶ 14, claiming that "Johnson breached the parties' agreement by concealing from [Burson] information regarding sales of SuperVision and by withholding and causing IDG to withhold [Burson's] share of the proceeds from the sales." Second Amended State Complaint at ¶ 6. These infringement claims do not contemplate, and certainly do not depend upon, the kind of promotional activity which Johnson described in his affidavits and deposition testimony. See, e.g., Farmington Casualty v. Cyberlogic Tech., 996 F.Supp. 695, 704 n. 17 (E.D. Mich. 1998) ("when the claim for infringement exists irrespective of the advertising activities, the claim for defense must fail.").

Second, moving beyond the complaints – as we are required to do under Oklahoma law – IDG's points to no place in Burson's Federal or State Lawsuit pleadings or any other relevant source wherein any connection was made linking IDG's "advertising" practice with the injuries allegedly suffered by Burson. Nor is there any place in the proceedings of Burson's lawsuits supporting the proposition that the claims alleged by Burson were the result of any advertising activity by IDG, let alone from IDG's promotion of SuperVision. Indeed, at oral argument, IDG conceded that at no time during the federal trial or during the state proceeding did Burson make any reference to the promotional activity relied upon by IDG here.

Third, IDG fails to demonstrate that CNA was ever made aware of – or that CNA should have been aware of –

IDG's practice of distributing free samples at the time coverage was requested. See First Bank of Turley, 928 P.2d at 303-04 (noting that insurer's duty to defend is determined "on the basis of information gleaned from the petition (and other pleadings), from the insured and from other sources *available to the insurer at the time the defense is demanded* (or tendered).") (emphasis added). Indeed, the affidavit and deposition testimony of Johnson was procured during the course of this litigation, well after IDG's requests for coverage were tendered to CNA. See id. at 304 n. 19 ("the correctness of an insurer's decision to (or not) defend cannot be determined by 'later revealed facts' of which the insurer had no knowledge or notice."). Moreover, IDG fails to demonstrate that it made any information available to CNA at the time it requested coverage which could have led CNA to conclude that there was a possibility that Burson's alleged injuries had anything to do with advertising. Id. at 304 ("It is the insured's [IDG's] *sole* duty to give its insurer [CNA] timely *and adequate* notice of a third party claim to aid the insurer in the discovery of facts bearing on coverage.") (emphasis added) (footnote omitted).

The mere fact that SuperVision was advertised or distributed at some point in time is not sufficient to transform Burson's ownership infringement claims into advertising injury. See Novell, 141 F.3d at 988 ("The fact [the insured] may have advertised the competing product to consumers simply did not cause [the underlying plaintiff's] injuries"); see also Microtec Research, Inc. v. Nationwide Mut. Ins. Co., 40 F.3d 968, 971 (9th Cir. 1994) ("If the [insured] does some wrongful act and then advertises it, harm caused by the wrongful act alone is not within the scope of the term advertising injury."); Farmington, 996 F.Supp. at 702 (holding that causal connection between alleged injuries and advertising activity cannot be satisfied by "a mere showing that the allegedly infringing product was advertised."). "Otherwise,

advertising injury coverage would apply whenever an advertised product or service is alleged to have caused harm, rendering the coverage applicable with respect to most claims against an insured business." Advance Watch Co., Ltd. v. Kemper National Ins. Co., 99 F.3d 795, 806 (6th Cir. 1996); see also National Union Fire Ins. Co. v. Siliconix Inc., 729 F.Supp. 77, 80 (N.D. Ca. 1989) ("Taken to its extreme, this argument would lead to the conclusion that any harmful act, if it were advertised in some way, would fall under the grant of coverage merely because it was advertised. Under this rationale, for instance, injury due to a defective product which is sold as a result of advertising activity and which later harms a consumer, may fall within the coverage grant.... Thus, a great many acts may fall within the ambit of advertising, extending injury coverage far beyond the reasonable expectations of the insured.").

In addition, the simple fact that Burson sought to enjoin the "distribution" of SuperVision in the federal complaint[7] or that he may have been entitled to statutory damages if he had prevailed on his copyright claims does not change the nature of Burson's alleged injuries. Those issues relate to the *remedies* available to Burson and do not change the nature of the injuries alleged in Burson's lawsuits from "copyright" to "advertising." Nor do they address IDG's failure to demonstrate here that CNA was ever made aware of any connection between Burson's purported injuries and advertising activity at the time a defense was requested.

V.

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[7] In the Federal Lawsuit, Burson sought the "[i]ssuance of a permanent injunction enjoining Defendants and all other persons working in concert from in any way copying *or distributing* copies of the programs." Federal Lawsuit Complaint at *3 (emphasis added).

There is nothing on this record to suggest that Burson's alleged injuries were sufficiently related to "advertising activity" on the part of IDG so as to invoke defense and/or liability coverage under the insurance policies at issue. For the foregoing reasons, the district court's judgment in favor of CNA will be AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 99-C-111-B(M)

IDG, INC. and R. BRENT JOHNSON, Plaintiffs,

v.

CONTINENTAL CASUALTY COMPANY, TRANSPORTATION INSURANCE COMPANY, and VALLEY FORGE INSURANCE COMPANY, Defendants.

December 26, 2000

ORDER

Before the Court are the cross-motions for summary judgment filed by Plaintiffs, IDG, Inc. ("IDG") and R. Brent Johnson ("Johnson") (Docket No. 18), and Defendants, Continental Casualty Company ("Continental"), Transportation Insurance Company ("Transportation") and Valley Force Insurance Company ("Valley Forge") (hereinafter collectively referred to as "CNA") (Docket No. 12), as well as Defendants' Objections to Admissibility of Affidavit of R. Brent Johnson

(Docket No. 32).[1] Plaintiffs allege defendants breached their insurance contracts with plaintiffs by refusing to provide a defense to IDG and Johnson, an officer, director and majority shareholder of IDG, in the lawsuits brought against them by Darrell Burson, a minority shareholder of IDG, in Tulsa County District Court, *Burson v. IDG, Inc. and Rupert Brent Johnson*, Case No. CJ-94-1057 ("state lawsuit") and in U.S. District Court for the Northern District, *Burson v. Johnson, Global Interface Solution, Inc. and IDG, Inc.*, Case No. 97-C-863-E ("federal lawsuit"), (collectively referred to as the "Burson cases") as well as a lawsuit brought by Diversified Data Resources in the Superior Court of California, Marin County, *Diversified Data Resources v. IDG, Inc., et al.*, Case No. 175252 (the "DDR lawsuit"). Plaintiffs contend they are entitled to defense and indemnity in the state lawsuit and a defense in the federal lawsuit because the allegations therein constitute "property damage" "personal injury" and/or "advertising injury". CNA assert the allegations in the Burson cases are not covered by the respective policy and plaintiffs have no claim arising from the DDR lawsuit. Both parties seek summary judgment.

SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). In *Celotex*, the Supreme Court stated:

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[1]Defendants' Objections to Plaintiffs' Evidence (Docket No. 39) concerning exhibits 33 and 34 have been addressed. *See* Substituted Exs. 33 and 34 attached to Plaintiff's Response (Docket No. 39).

> [t]he plan language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322 .

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

STATEMENT OF UNDISPUTED FACTS

Plaintiff IDG is an Oklahoma corporation with its principal place of business located in Tulsa, Oklahoma. Plaintiff Johnson is a stockholder, officer, director and employee of IDG. The Defendants Transportation, Continental and Valley Forge (collectively, "CNA") are insurance companies which sell insurance policies within Oklahoma.

Plaintiffs IDG and Johnson are insured under Valley Forge commercial general liability ("CGL") policies, Policy No. Pl 27819677 and Policy No. B1 31455338, with policy periods 9/16/93 to 9/16/94 and 9/16/94 to 9/16/96, respectively; Transportation commercial general liability policies, Policy No. B1 57115402, with policy periods from 9/16/99 to 9/16/99; and under Continental commercial umbrella policies, Policy No. B1 56852312, with policy periods from 9/16/96 to 9/16/99.

CNA's CGL policies state:

> **COVERAGE B. PERSONAL AND ADVERTISING INJURY**
>
> **1. Insuring Agreement**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" or "advertising injury" to which this coverage part applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" or offense and settle any claim or "suit" that may result . . . .
>
> * * *
>
> b. This insurance applies to: . . .
>
> (2) "Advertising injury" caused by

an offense committed in the course of advertising your goods, products or services;

but only if the offense was committed in the "coverage territory" during the policy period.

* * *

2. "Advertising injury" means injury arising out of one or more of the following offenses:

   a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

   b. Oral or written publication of material that violates a person's right or privacy;

   c. Misappropriation of advertising ideas or style of doing business; or

   d. Infringement of copyright, title or slogan.

CNA's umbrella policies provide:

We will pay on behalf of the insured all sums that the insured becomes legally obligated to pay as "ultimate net loss" because of . . . "Advertising injury,"[2] caused by an "incident"

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[2]The definition of "Advertising injury" is identical to that in the CGL policies.

> which takes place during the policy period and in the policy territory.

An "incident" is defined under the umbrella policies as follows:

> With respect to claims which are covered, in whole or part, by the immediate "scheduled underlying insurance" policy (whether or not the limits thereof become reduced or exhausted), "incident" means either an occurrence or offense, depending upon which term triggers coverage in your immediate "scheduled underlying insurance" policy.

On or about March 11, 1994, Burson filed suit against IDG and Johnson, both individually and as a director of IDG, in the District Court in and for Tulsa County ("state lawsuit") seeking (1) unpaid wages from IDG; (2) damages for breach of an agreement for the division of royalties for a series of computer programs called SuperVision, SuperVision II, and SuperVision 3 (collectively referred to as "SuperVision") which he and Johnson invented; (3) damages for conversion of SuperVision; (4) to enforce IDG shareholders' rights, through a derivative shareholder action, for Johnson's improper transfer of corporate assets to non-employees; and (5) damages for Johnson's misrepresentation to Burson concerning future disbursements of the SuperVision proceeds. On June 29,1995, Burson filed an amended petition adding defendant Global Interface Solutions, Inc. ("Global") and seeking judgment against Johnson and/or Global that Johnson formed Global with the intent to defraud shareholders and creditors of IDG, and that Johnson fraudulently transferred IDG assets to Global and breached his fiduciary duty to IDG and its shareholders. On July 15, 1997, Burson, individually and on behalf of IDG, filed a Second Amended Petition, adding defendant Web

Technologies, L.L.C. ("Webtek") and a claim for breach of a Stockholder's Agreement between Burson and Johnson through Johnson's dissemination of confidential information, including sales records, customer lists and marketing information, to Global and Webtek.

Plaintiffs first notified CNA of the state lawsuit by letter dated March 28, 1994 (received by CNA on March 31, 1994). CNA declined to provide a defense and coverage for the lawsuit by letter erroneously dated April 18, 1994. The letter actually was sent via certified mail on May 10,1994 and was signed for by "K. Carpenter" as signature agent on May 13, 1994. After May 1994 through May 19, 1997, Plaintiffs did not provide any other information to CNA regarding the state lawsuit. By letter dated May 19, 1997, plaintiffs' counsel requested a reevaluation of coverage, asserting that copyright infringement violations were at issue. After receiving Plaintiffs' counsel's May 19, 1997 letter, the CNA adjuster handling the claim sought, obtained, and reviewed additional information from Plaintiffs' counsel about the state lawsuit. By letter dated August 21, 1997, CNA declined to provide a defense and coverage for the state lawsuit.

On September 17, 1997, Burson filed a complaint in federal court in the Northern District of Oklahoma against Johnson, IDG and Global for copyright infringement in Case No. 97-C-863-E ("federal lawsuit"). In his federal complaint, Burson alleges he is the author and owner of copyrighted computer programs, generally known as SuperVision and IDG, Johnson and Global infringed his copyright by preparing and distributing unauthorized copies of the programs for their own profit.

A year later, after prevailing on its "works made for hire" defense to Burson's copyright infringement claim in a

trial before the federal court, IDG, through its counsel's letter dated September 3, 1998, gave CNA notice of the federal lawsuit. This was the first time CNA received any information from Plaintiffs or their counsel regarding the federal lawsuit. By letter dated September 22,1998, CNA declined to provide coverage or a defense for the federal lawsuit. Plaintiffs' counsel requested reconsideration of this decision and a review of additional information provided by plaintiffs' counsel was undertaken. Again, CNA determined there was no coverage or duty to defend the claims asserted in the federal lawsuit and, by letter dated November 18, 1998, informed plaintiffs of this decision.

The DDR lawsuit against IDG and Johnson, among others, was filed on October 22, 1998. By letter dated November 18, 1998, CNA was notified of the DDR lawsuit. At that time, plaintiffs had already retained their own counsel to defend the lawsuit. CNA informed plaintiffs by letter dated December 14, 1998, that it would reimburse them for any defense costs if it determined there were coverage. By letter dated January 6 , 1999, the CNA adjuster handling the DDR lawsuit informed plaintiffs' counsel that she was still in the process of reviewing the voluminous materials provided, but that she would advise him shortly of her coverage determination. On January 25, 1999, CNA's adjuster notified plaintiffs' counsel by telephone that CNA would provide plaintiffs a defense and indemnity in the DDR lawsuit without a reservation of rights to later deny coverage or assert policy defenses. A follow-up letter was sent on February 2, 1999. CNA assumed defense of the DDR lawsuit and has reimbursed plaintiffs for all fees and costs submitted for payment in connection with the defense of the DDR lawsuit.

ANALYSIS

First, the Court dispenses with plaintiffs' claims relating to the DDR lawsuit and plaintiffs' reliance on the "property damage" and "personal injury" provisions of the policies. The undisputed facts establish that CNA timely assumed defense of the DDR lawsuit without a reservation of rights within ninety days of plaintiffs' tender and informed plaintiffs in writing that they would be reimbursed for all defense costs incurred. It is also undisputed that CNA has reimbursed plaintiffs for all invoices submitted to it. IDG and Johnson, therefore, have failed to establish any claim relating to the DDR lawsuit. Further, as the Court noted in its March 15, 2000 Order, the Tenth Circuit decision in *IDG, Inc. v. St. Paul Fire and Marine Insurance Company v. Darrell Burson,* 203 F.3d 835,2000 WL 135171 (10th Cir. 2000), is dispositive of plaintiffs' claim against CNA based on the "property damage" provisions of the CNA policies. The policy at issue in *St. Paul* included identical provisions as those at issue in this case relating to coverage for "property damage." *St. Paul* also involved the same underlying Burson actions for which IDG seeks defense and indemnity in this case. In *St. Paul,* this Court found and the Tenth Circuit affirmed that IDG was not entitled to defense or indemnity in the Burson cases based on the "property damage" language of the policy. Based on the *St. Paul* decision, the Court entered summary judgment for CNA defendants herein on the "property damage" provision of the policies on March 15,2000. Finally, the Court gives short shrift to plaintiffs' reliance on the "personal injury" provision of the policies. Plaintiffs provided no evidence that the Burson cases involved "disparagement" of the SuperVision programs, and thus, there is no merit to this

argument.[3]

The Court turns to plaintiffs' argument that it was entitled to a defense and/or indemnity for the Burson cases based on the "advertising injury" provisions of the CNA policies. Plaintiffs contend the Burson cases potentially include claims for "advertising injury" because (1) the policies define advertising injury to include copyright infringement committed in the course of advertising; (2) Burson claimed IDG and Johnson committed copyright infringement by copying and distributing his programs; and (3) it is undisputed that one of the ways IDG and Johnson copied and distributed copies of the programs was to distribute them to customers to promote their product. In short, it is plaintiffs' position that the Burson claims are for advertising injury because the claims relate to copyright infringement and at least part of the alleged infringing activities (copying and distributing) occurred in the course of advertising; *i.e.*, duplicating the program and providing copies of SuperVision to potential customers for their use and evaluation.

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[3]The "personal injury" provisions of the policies upon which plaintiffs rely states in pertinent part:

This insurance applies to:
"Personal injury" caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecast done by or for you;
* * *
but only if the offense was committed in the "coverage territory" during the policy period.

"Personal injury" means injury, other than "bodily injury," arising out of one or more of the following offenses:
* * *
e. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services. . .

Oklahoma courts have not yet considered what constitutes an advertising injury under this language. "Advertising injury" as defined in the subject policy provision is generally viewed as consisting of three elements:

> 1. the underlying case states a claim for an injury arising out of an enumerated offense;
> 2. the insured is engaged in a course of advertising its goods, products or services; and
> 3. there is a causal connection between the alleged injury and the advertising activity.

See e.g. New Hampshire Ins. Co. *v. R.L. Chaides Constr. Co.*, 847 F.Supp. 1452, 1456 (N.D. Cal. 1994).

The Court concludes the allegations in the Burson cases constitute a claim of copyright infringement, one of the enumerated offenses covered in the policies. Although CNA argues that the state lawsuit did not include a copyright infringement claim, the Court finds the allegations that IDG and Johnson converted Burson's ownership interest in the SuperVision programs and the fact that the programs were copyrighted are sufficient to state a claim of copyright infringement. Indeed, as a result of plaintiffs' motion to dismiss in the state lawsuit, Burson brought a copyright infringement claim in the federal lawsuit.

Copyright infringement, however, is not covered under the subject policies. For there to be coverage, plaintiffs must show their alleged copyright infringement occurred during the course of advertising its SuperVision program and Burson was injured from that advertising activity. The policies do not provide, as they might, a definition of "advertising." If not defined, the Court must give the term its ordinary and plain meaning. 15 O.S. §160. If ambiguous, the Court must construe

the term against the insurer. 15 O.S. §170. The Court notes that the type of "advertising" a business employs may differ with "the product, the size of the company, the company's marketing system, or the size of the target market." *Amway Distributors Benefits Ass'n v. Federal Ins. Co.*, 990 F.Supp. 936,945 (W.D.Mich. 1997). Thus, the term can be broadly or narrowly construed. Not surprisingly, courts are divided as to whether a broad or narrow definition of advertising should be applied:

> Courts have generally entertained two competing definitions of the term "advertising" -one broad and the other narrow. Courts adopting the narrow definition hold that "advertising" refers strictly to widespread announcements or distribution of promotional materials directed at the "public at large." . . . On the other hand, courts adopting the broad definition have held that promotional activities directed at particular individuals or groups rather than to the public at large may also be considered advertising . . . . Furthermore, it is not certain whether the narrow or the broad definition, or either, may properly be viewed as the majority rule.

Farmington Casualty Co. v. Cyberlogic Technologies, Inc., 996 F.Supp. 695,700 (E.D.Mich. 1998); *Cf. Bank of the West v. Superior Court*, 2 Cal.4th 1254,833 P.2d 545, 560 n.9, 10 Cal.Rptr.2d 538 (Cal. 1992) ("Most of the published opinions hold that "advertising means widespread promotional activities directed to the public at large.") *with U. S. Fidelity & Guar. Co. v. Star Tech. Inc.*, 935 F.Supp. 1110, 1114 (D.Or. 1996)("The majority of courts. . . have broadly construed 'advertising activity' to encompass a variety of business solicitations."). The Court, therefore, "would abandon common sense to

conclude that the term 'advertising' is not ambiguous, given that the many courts that have carefully considered its definition have arrived at such disparate conclusions." *Farmington* 996 F. Supp. at 702; *see also Tri-State Ins.* Co. *v. B&L Products, Inc.*, 964 S.W.2d 402,404-05 (Ark.App. 1998)(finding the term "advertising" ambiguous and construing it against the drafter insurer). Accordingly, the Court construes the term "advertising" broadly in favor of the insured and finds IDG's method of promoting the SuperVision program through distribution of copies of the program to specified, potential customers falls with the ambit of advertising. *R.L. Chaides Constr.*, 847 F.Supp. at 1456 ("Advertising activity must be examined in the context of the overall universe of customers to whom a communication may be addressed; to hold otherwise would effectively preclude small businesses . . . from ever invoking their rights to coverage for advertising injury liability.").

Plaintiffs' burden, however, does not end there. Plaintiffs must also show there is a nexus between the advertising activity and the alleged copyright infringement. *Novell Inc. v. Federal Ins. Co.*, 141 F.3d 983,988-89 (10th Cir. 1998) (applying Utah law); *Simple Fresh Fruit, Inc. v. Continental Ins.*, 94 F.3d 1219, 1223 (9th Cir. 1996)("under the policy, the advertising activities must cause the injury -- not merely expose it"). Proof of this nexus is particularly important where "advertising" is interpreted broadly. *Amway Distributors*, 990 F.Supp. at 946 ("If no causal relationship were required between 'advertising activities' and 'advertising injuries,' then 'advertising injury' coverage, alone, would encompass most claims related to the insured's business.").

Although it is undisputed that CNA rejected defense and coverage under the "advertising injury" provisions based on its judgment that the alleged infringing activity in the

Burson cases did not occur during the course of advertising, Plaintiffs present no statement of undisputed fact to establish a nexus in this case. There is no allegation in the Burson complaints regarding advertising. Selling the SuperVision program is not equivalent to advertising the program. Indeed, the only evidence in the record regarding a causal relationship are the following: IDG's answer to Interrogatory No. 9, Johnson's deposition testimony and statement in his affidavit.

INTERROGATORY No. 9:

> If you contend that either the State Lawsuit or the Federal Lawsuit involved any assertion or allegation by Darrell Burson that the acts of which he complained were caused by you advertising your goods, products, or services, then describe such assertions or allegations.

RESPONSE TO INTERROGATORY NO. 9:

> Mr. Burson's pleadings make claims related to copyright infringement for goods sold by Johnson/IDG which in turn were advertised for sale. From Mr. Burson's testimony such alleged conduct occurred as early as June 1993, some in September and October 1993, and at various times thereafter. The claims of Burson and the underlying facts present a potential for coverage when considered broadly under the policy. Because there is an allegation of placing the products on the market for sale, there was a potential that the infringement related to or was connected to advertising.

Defendants' Ex. 4C.

In response to CNA's follow-up on Interrogatory No. 9, Johnson testified at his deposition as follows:

Q. Do you have anything further to add to the question, "If you contend that either the State Lawsuit or the Federal Lawsuit

involved any assertion or allegation by Darrell Burson that the actions of which he complained were caused by you advertising your goods, products, or services, then describe such assertions or allegations"?

A. And the question is do I have more than this?

Q. Uh-huh.

A. Well, I could go on and on with this, but this is -this is it boiled down into a condensed manner for this - for this purpose.

Q. Okay. Then we'll talk about that. Tell me why - further why you contend that the state or federal lawsuit involved an assertion by Burson that he -the acts of which he complained, his injuries were caused by Johnson/IDG advertising its good, products or services.

A. I mean, that's the whole thing of what we were doing. I mean, we were -we were making copies of programs which he claimed that were his.

Q. Okay.

A. That he had - that he at a later date filed copyright on, that we were -we were copying those and delivering those to customers so that they could evaluate them and to see whether or not they wanted to use them. We were - this is the manner in which - the manner in which we advertise our product is by providing people with free trials. We copy the programs. We send them out on some sort of electronic media and they install them, evaluate them, see how they work, observe them, and make a decision.

Q. So before you -

A. That - that is our method of operation, a method of advertising.

Q. So before you provide it to a customer for a demo, you've already copied what Mr. Burson claims was his proprietary interest?

A. Yes.

Plaintiffs' Ex. 25, Johnson's deposition, pp. 108-09.

And finally, after generally claiming coverage under the policies for "advertising injury," Johnson attested in his affidavit[4] that

> [i]ndependent of the policy provisions that establish coverage, IDG and I have and had a "reasonable expectation" of coverage for defense and indemnity for the claims made in the "Burson Cases". This reasonable expectation comes in part from policy provisions that state that the insurer will defend claims made against IDG and me if they involve copyright infringement that occurs in the course of advertising. IDG and I copied Burson created source and object code in the course of and as part of IDG's advertising program for its products. Burson claims that IDG and I had infringed his copyright by copying the programs.

Plaintiffs' Ex. 28, Johnson's affidavit ¶12.

Farmington Casualty v. Cyberlogic Technologies, 996 F.Supp. 695,700 (E.D.Mich. 1998) is directly analogous to the instant case. In *Farmington,* the District Court in Eastern District of Michigan held that plaintiff Farmington Casualty Co. ("Farmington") did not owe its insured Cyberlogic Technologies, Inc ("Cyberlogic"), a software developer, a duty to defend or indemnify it in a lawsuit alleging, *inter alia,* copyright infringement brought by another software developer,

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[4]The Court overrules defendants' objections to the Johnson affidavit. (Docket No. 32).

Wonderware Corporation ("Wonderware"). Wonderware claimed that Cyberlogic developed a driver ("FIX Driver") that allows one version of an industrial automation software ("FIX for Windows") to interact with certain programmable controllers which infringed its copyright of similar software ("In Touch for Windows"). *Farmington,* 996 F. Supp. at 696-98. Cyberlogic claimed the allegations in the Wonderware suit constituted "advertising injury" under its CGL policy with Farmington.

> [B]ecause the FIX Driver itself, albeit with a four-hour life-span, was distributed to potential customers as a free sample or demonstration, the FIX Driver is in itself an advertisement. In short, it concludes that the FIX Driver has a dual identity, that it is at once (i) a product and (ii) an advertisement for that product. It then concludes that there can be no argument that the advertisement did not cause the infringement, because the advertisement itself infringes.

Id. at 703.

Although applying a broad definition of advertising, the *Farmington* court found the sample CD containing the FIX Driver was not advertisement:

> this Court adopted the broad definition of advertising: "any oral, written or graphic statement made by the seller in any manner in connection with the solicitation of business." . . . Whether the Court follows this definition or some other, it notes that the competing definitions agree in that they require that an "advertisement" make a statement about its

> subject. The product itself cannot meet this requirement. It does not convey an independent message about the product: it simply is the product.

Id. at 703 (citations and footnote omitted). The court further found that even if the free sample of the FIX Driver were viewed as an advertisement, the insured claim for a defense still fails upon application of the nexus requirement:

> In [Simply Fresh Fruit v. Continental Ins. 94 F3d 1219 (9th Cir. 1996)] the insured argued that it was entitled to a defense because it used the patented process - and therefore committed acts of patent infringement - in conjunction with its advertising activities. Here, Cyberlogic similarly argues that it is entitled to a defense because it provided a free sample, or demonstration, of the FIX Driver in conjunction with advertising activities. Both of these arguments falter on a fundamental misunderstanding of the causal connection requirement. In both cases, there is indeed a relationship between the advertising and the alleged infringement - a "relationship in time, place [and] circumstance." . . . However, as those advertising activities did not give rise to the infringement claims - or, because the infringing acts 'could have occurred independently and irrespective of any advertising' - that relationship is not causal in nature.

Farmington, 996 F.Supp at 705.

As CNA's duty to defend is "separate from, and broader than" its duty to indemnify, the Court views the above evidence and the allegations in the Burson cases to determine whether they give rise to "the potential of liability" under the policies at the time the defense was demanded. *First Bank of Turley v. Fidelity and Deposit Ins. Co. of Maryland,* 928 P.2d 298, 303 Okla. 1996). The Court concludes they do not. IDG and Johnson have not established the alleged infringing program, SuperVision, was an advertisement for itself. However, even if it were, the Court finds that plaintiffs have not shown the required causal connection or nexus between the alleged infringement and advertising. Burson alleged IDG and Johnson converted his ownership interest in the SuperVision software and infringed his copyright in the software by copying the software. That infringing act occurred independently and irrespective of any advertising.

The Court finds no potential for coverage under the CNA CGL and umbrella policies and defendants Valley Forge, Transportation and Continental, or reasonable expectation thereunder, that requires CNA to defend or indemnify IDG and Johnson in the Burson cases. Further, defendants timely accepted a duty to defend plaintiffs in the DDR lawsuit and have reimbursed plaintiffs for all submitted fees and costs. Thus, plaintiffs have failed to establish CNA breached it policies or committed bad faith. Accordingly, the Court grants defendants' motion for summary judgment (Docket No. 12) and denies plaintiffs' motion for summary judgment (Docket No. 18).

IT IS SO ORDERED, THIS 26TH DAY OF DECEMBER, 2000.

ENTERED: [THOMAS R. BRETT]
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 99-C-111-B(M)

IDG, INC. and R. BRENT JOHNSON, Plaintiffs,

v.

CONTINENTAL CASUALTY COMPANY, TRANSPORTATION INSURANCE COMPANY, and VALLEY FORGE INSURANCE COMPANY, Defendants.

December 26, 2000

JUDGMENT

In accord with the Order filed this date sustaining the Defendants' Motion for Summary Judgment and overruling the Plaintiffs' Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, Continental Casualty Company, Transportation Insurance Company and Valley Forge Insurance Company, and against the Plaintiffs, IDG, Inc. and R. Brent Johnson. Plaintiffs shall take nothing on their claim. Costs are assessed against the Plaintiffs upon timely application pursuant to N. D. LR 54.1, and each party is to pay its respective attorney's fees.

Dated this 26th day of December, 2000.

ENTERED: [Thomas R. Brett]
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

IDG, INC. and R. BRENT JOHNSON,
Plaintiffs-Appellants,

v.

CONTINENTAL CASUALTY COMPANY, TRANSPORTATION INSURANCE COMPANY, and VALLEY FORGE INSURANCE COMPANY,
Defendants-Appellees.

No. 01-5011

ORDER
Filed January 23, 2002

Before **Tacha, Garth**, and **Ebel**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court
by: Ben Vasquez
Deputy Clerk